

THE ESTATE OF ERIC A. POWELL, etc., et al. vs. CITY AND COUNTY OF HONOLULU, et al.

THOMAS C. EBRO

December 15, 2006

SHEET 1 PAGE 1

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

THE ESTATE OF ERIC A. POWELL, THROUGH PERSONAL REPRESENTATIVE MARY K. POWELL; THE ESTATE OF JAMES D. LAUGHLIN, THROUGH PERSONAL REPRESENTATIVE RAGINAE C. LAUGHLIN; MARY K. POWELL, INDIVIDUALLY; RAGINAE C. LAUGHLIN, INDIVIDUALLY; CHLOE LAUGHLIN, A MINOR, THROUGH HER NEXT FRIEND, RAGINAE C. LAUGHLIN,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU,

Defendant,

and

CITY AND COUNTY OF HONOLULU,

Third-Party Plaintiff,

vs.

UNIVERSITY OF HAWAII, a body corporate; JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS AND DOE ENTITIES,

Third-Party Defendants.

CIVIL NO. CV04 00428 LEK
DEPOSITION OF
THOMAS C. EBRO

PAGE 3

3

I N D E X

	PAGE
EXAMINATION BY:	
Mr. Mayeshiro	4
Ms. Waters	96
FURTHER EXAMINATION BY:	
Mr. Mayeshiro	101
Ms. Waters	112
EXHIBITS MARKED FOR IDENTIFICATION:	
Defendant's 1 through 11	13
Defendant's 12	113

PAGE 2

2

DEPOSITION OF THOMAS C. EBRO

Taken via teleconferencing on behalf of Defendant at the Law Offices of Ian L. Mattoch, Suite 1835, Pacific Guardian Center, 737 Bishop Street, Honolulu, Hawaii, commencing at 8:04 a.m., on Friday, December 15, 2006, pursuant to Federal Rules of Civil Procedure.

BEFORE: PHYLLIS K. KUSHNER, CSR NO. 147
Notary Public, State of Hawaii

HONOLULU REPORTING SERVICES
1000 Bishop Street, Suite 401
Honolulu, Hawaii 96813
PHONE (808) 524-6288

APPEARANCES:

For Plaintiffs: EMILY KAWASHIMA WATERS, ESQ.
Law Offices of Ian L. Mattoch
Suite 1835, Mauka Tower
Pacific Guardian Center
737 Bishop Street
Honolulu, Hawaii 96813

For Defendant: DEREK T. MAYESHIRO, ESQ.
Deputy Corporation Counsel
City and County of Honolulu
Honolulu Hale, Suite 110
530 South King Street
Honolulu, Hawaii 96813

PAGE 4

4

(The Reporter's Disclosure Statement was made available to all counsel prior to the commencement of the following proceedings.)

THOMAS C. EBRO,

called as a witness on behalf of the Defendant, having been first duly sworn was examined and testified by video-conference and telephone as follows:

EXAMINATION

BY MR. MAYESHIRO:

Q. Can you state your name and business --

A. I don't --

Q. -- address for the record?

A. Counsel, I don't think -- counsel, I don't think I see you. I will tell you what I see on my screen, and you have the control on your end. I see, I think I see Ms. Waters on the left lower screen and a gentleman with a blue shirt lower right with the screen showing mostly top, mostly ceiling. Is there a way you can drop it down so I can see who it is I'm speaking with?

Q. Is that --

A. In fact, it's a frozen screen I think right now.

MS. WATERS: Is that better?

THE WITNESS: Maybe I should get somebody. No, it is a still frozen scene.

HONOLULU REPORTING SERVICES
PHONE: (808) 524-6288

EXHIBIT G

THE ESTATE OF ERIC A. POWELL, etc., et al. vs. CITY AND COUNTY OF HONOLULU, et al.

THOMAS C. EBRO

December 15, 2006

SHEET 6 PAGE 21

21

1 feature in more than just aquatic settings.
 2 Q. Okay. And have you ever utilized a system like
 3 that personally?
 4 A. I have utilized public address systems, yes.
 5 Q. Okay. So the type of system that you are
 6 describing, it would specifically consist of what type of
 7 components? There would be some type of a speaker system
 8 set up at Witches Brew? Is that what you are saying?
 9 A. Well --
 10 Q. And then some type of control switch and microphone
 11 at a lifeguard station?
 12 A. That's correct. And we have two lifeguard
 13 stations. In this case, both would have had the
 14 capability of switching or pushing the button to activate
 15 this zone and then being able to activate that loudspeaker
 16 with a microphone.
 17 Q. Okay. A system like that that you described would
 18 presuppose that the lifeguards are able to see the
 19 swimmers or snorkelers swimming towards Witches Brew; is
 20 that correct?
 21 A. That's correct. They have the duty to do so. That
 22 is their inherent responsibility is to have a constant
 23 monitoring and ability to view all the swimmers in the
 24 area.
 25 Q. Okay. Well, I'm just trying to understand because

PAGE 23

23

1 attention, and a diagram normally helps by depicting a
 2 person, you know, erect and with a hand up, making himself
 3 more visible.
 4 In addition on those water safety rules should have
 5 been diagrams that depict the area of Witches -- of
 6 Hanauma Bay with those danger areas from which you -- at
 7 which people were prohibited from venturing to needed to
 8 be marked conspicuously and marked as keep away areas,
 9 danger areas.
 10 Q. Okay. First of all, in response to those two items
 11 that you just mentioned, the buddy system, the water
 12 safety rules that you mentioned, that really wouldn't be
 13 applicable here because Mr. Powell and Mr. Laughlin were
 14 actually swimming together using that buddy system you
 15 just described as far as you know, correct?
 16 A. I don't understand the question when you asked why
 17 that would not have been applicable. They eventually
 18 ended up swimming or snorkeling as a buddy pair. They at
 19 one point parked their car. They entered the theater
 20 area, paid their ticket. They entered the theater, had an
 21 opportunity there to have that information conveyed. It
 22 should have been included in the video, should have been
 23 signs there so that that reinforcement of those danger
 24 areas and what is down below would have been a multiple or
 25 a repeated process.

PAGE 22

22

1 I have never seen a system like that. So I want to be
 2 sure the system or the speaker warning that would come out
 3 over the loudspeaker would not be somehow automated based
 4 on some type of motion sensor or some other type of
 5 device.
 6 But the manner in which you describe it, it would
 7 be activated because a lifeguard sees a swimmer or a
 8 snorkeler approaching an area that has been restricted or
 9 warned about, and then the lifeguard speaks into the
 10 microphone. And whatever the lifeguard says is
 11 transmitted to the speaker system, and it is broadcasted
 12 that way, correct?
 13 A. That's correct.
 14 Q. And another component you mentioned as far as
 15 aquatic risk management safeguards was warning signs,
 16 correct?
 17 A. Yes.
 18 Q. And what specifically would you have the warning
 19 signs say?
 20 A. Well, there's two areas. Warning signs need to,
 21 needed to be, needed to emphasize water safety rules, and
 22 in this instance, it should have emphasized the need for a
 23 buddy system, that all snorkeling needs to take place with
 24 a buddy. A buddy is a built-in alarm system. Something
 25 happens to one, the other is in position to call

PAGE 24

24

1 I'm now referring to warning signs, and I'm talking
 2 about depicting the danger area so that a person looking
 3 from top down would have a kind of comparative diagram to
 4 a real scene. And it would be further reinforced once the
 5 person got on the bottom and prior to undertaking
 6 snorkeling. It would be embedded in the snorkeler's mind
 7 already from those prohibitions and diagrams having been
 8 presented.
 9 Q. Mr. Ebro, I know you reviewed a number of documents
 10 in preparation for or to arrive at your conclusions. Was
 11 one of those documents the deposition transcript of
 12 Mrs. Powell?
 13 A. Yes, it was.
 14 Q. Okay. And isn't it true that Mrs. Powell testified
 15 in her deposition that her husband, Mr. Powell, and her
 16 brother, Mr. Laughlin, were snorkeling together?
 17 A. That's correct.
 18 Q. And as far as you know, there is nothing to
 19 indicate that they were not swimming together until the
 20 point where a lifeguard sees one of the swimmers coming
 21 around Witches Brew point, correct?
 22 A. Their snorkeling was not witnessed until that time,
 23 that's correct.
 24 Q. So based upon what we do know, it appears that
 25 Mr. Powell and Mr. Laughlin were snorkeling together, and

THE ESTATE OF ERIC A. POWELL, et al. vs. CITY AND COUNTY OF HONOLULU, et al.

THOMAS C. EBRO

December 15, 2006

SHEET 10 PAGE 37

37

different organizations create as a detection response or a detection intervention standard or requirement. If a lifeguard does that, complies, the person lives versus if that time frame is not met, detection does not, is not in that confined period and a response is later than that confined period, then the person either suffers brain damage or he is not going to survive.

And lifeguards are really lifesavers whose intention is to fulfill their job given their environment within a given time in a pool, that is, 10/20 second rule because pools are supposed to be so equipped and there are features there that are lacking in an open environment. So therefore the time frame can be shortened as stated, the beach lifeguards and Bruster, as described on these pages, the time period for which you must equip yourself both manpower-wise and equipment-wise in terms of transport of the victim.

Q. Okay. Mr. Ebro, turning to the lifeguards' gross inattentiveness that you reference in the first paragraph on page 18, which lifeguards are you speaking of specifically?

A. I was speaking about the lifeguards that were required to be attentive in Tower 3-A, the center tower, namely, WSO Moses and WSO Neves.

Q. Okay. What specifically do you base your

PAGE 39

39

lifeguard Clarence Moses was talking on his cell phone at the time of this incident?

A. No, I have not received -- I have not read any such document.

Q. Do you have any information or review any document that indicated Clarence Moses was sleeping at the time this incident occurred?

A. No. To the first answer, I was taken back by, by some material I read indicating that cell phones were permitted or allowed into the towers. That is not a good idea for what to us is an obvious awareness and understanding, but no, I did not have any evidence of their either talking -- him talking on the phone or that he was sleeping.

Q. Okay. And, in fact, there is nothing to indicate whether or not Mr. Moses had his cell phone in the tower, there is nothing to indicate that that distracted him in any way; isn't that true?

A. Well, his actions were not notified. His deposition is the only access I have to what went on, and what was glaringly evident was what didn't go on, namely, his -- that long omission of his attentiveness, namely, his failure to detect and bring about a halting process towards the two snorkelers who were not only going into an area that had been disallowed for people to be in that day

PAGE 38

38

conclusion that they were grossly inattentive?

A. Well, their testimony reveals that the, that their awareness of the snorkelers in the vicinity of the Witches' Brew danger was the first -- in fact, it was just one person, and it occurred when they were adjacent to it or in close proximity evidencing that their, their drift and their snorkeling, their approach went unnoticed.

And that is what the lifeguards were, you know, improper about. They were required to as they testified in deposition to halt people on that day from passing through and continuing past the slot into the area beyond the reef, and in this case, they just didn't materialize out there. They obviously from what Mrs. Powell said entered that area, and from the time they seen and evidenced that, they were able to make progress to that area.

But the reason it is so gross and so improper is that by the time they were seen, there was an opportunity not only to manifest the emergency, but they had by now already separated with one being smashed on the rocks and with the other already drifted out of sight. So the failure to see and halt their progress toward Witches Brew is what made their conduct so unreasonable egregious.

Q. Let me ask you this, Mr. Ebro. Did you review any document or do you have any information that indicates

PAGE 40

40

but were progressing for an ample lengthy time and managed to have their emergency and for that matter their separation, and it all went undetected till it was too late.

Q. Mr. Ebro, other than the fact that Mr. Moses did not see Mr. Powell and Mr. Laughlin in the Witches Brew area, other than that fact, do you have any other information that indicates Mr. Moses was not properly scanning?

A. No, I don't, sir. I don't need it. For me, his duty is clear. He needs to see these things. He didn't see them. His duty is to not, not just see them but to take proper action in a preventive sense. He failed to do that. This all goes to found or ground the, the confident conclusion that he was inattentive.

Q. Okay.

A. His purpose and his mission was that this is what he was doing, but the evidence is that people were able to, you know, to arrive and to end up in a place, and their approach to that place, what was dangerous, went unseen. That evidences his inattention.

Q. Okay. Mr. Ebro, if you know, how long would it take a snorkeler to swim from the slot to the Witches Brew area where Mr. Powell's body was found, if you know?

A. Well, in my report I mentioned that I estimated or

THE ESTATE OF ERIC A. POWELL, etc., et al. vs. CITY AND COUNTY OF HONOLULU, et al.

THOMAS C. EBRO

December 15, 2006

SHEET 12 PAGE 45

45

1 where a missing swimmer announcements and search occurred
2 and where I ultimately suited up and conducted the
3 underwater search and made a recovery beneath the dock.

4 And from investigation it turned out that the young
5 man had avoided detection by a lifeguard by sneaking and
6 diving underneath and seeking to breathe air that he
7 thought was under the dock and injured himself, became
8 disoriented, and in the process drowned.

9 Q. Were you the only lifeguard on duty on that
10 occasion?

11 A. I wasn't on duty. I was not on a stand. I was
12 directing the operation. There were lifeguards on duty
13 that were responsible and assigned by me and supervised by
14 me, and so my on-duty status was in a capacity different
15 than a scanning lifeguard.

16 Q. The other body recovery that you mentioned, were
17 you supervising the recovery, or were you one of the
18 lifeguards that was monitoring the area at the time?

19 A. Neither. The second one was on the opposite end of
20 the lake. There was a commotion. Boats had collided, and
21 there was some commotion and we responded in a patrol boat
22 with others and made the dive to recover a victim that,
23 that along with others had been involved in that accident.
24 It was too late to save the victim that was on the bottom.

25 Q. Mr. Ebro, we are going to take a short break.

PAGE 47

47

1 talking about here, however. While that is a predominant
2 thing that may pose challenges to lifeguarding, certainly
3 two, as in this case, two snorkelers being in an area that
4 they weren't supposed to be, being in an area of the slot
5 that just earlier they had had a lifeguard out there,
6 Neves, chasing people back, turning them back, but yet
7 being allowed to conspicuously pass through that area and
8 then advance towards the dangerous area of Witches Brew,
9 to have that event and that long duration go unnoticed
10 was, was egregious only because we are not talking about
11 passive snorkelers. We are talking about snorkelers who
12 are actively moving and therefore conspicuous versus
13 nonconspicuous.

14 Q. Mr. Ebro, isn't it that we don't know exactly what
15 happened to Mr. Powell as to what caused him to get in
16 trouble? Is that fair to say?

17 A. That's correct.

18 Q. Okay. And --

19 A. We don't know, but, you know, I am here appearing
20 as a person who has had experience, an extensive
21 experience, in this sport of scuba diving and aquatics in
22 general for most of my life. So I'm answering not that we
23 don't know, but from the standpoint of this experience
24 that I have had with this case of estimating, and I have
25 covered in my report the things that reliably lifeguards

PAGE 46

46

1 Let's go off the record.

2 (Recess was taken.)

3 Q. (By Mr. Mayeshiro) Mr. Ebro, are you ready to
4 begin?

5 A. Yes. Well, that was a quick ten minutes. Of
6 course, I'm ready.

7 Q. Okay. We are trying to get you out of here as soon
8 as possible.

9 A. Oh, no, you're fine. Take all the time you like.

10 Q. You mentioned something earlier, Mr. Ebro, that
11 snorkelers don't always move, that sometimes they are just
12 floating on the surface of the water. Do you remember
13 mentioning that?

14 A. Yes. Yes, I did.

15 Q. And this would be true especially at Hanauma Bay
16 where the snorkelers who are in the bay with their snorkel
17 equipment are floating face down and looking at the
18 various underwater activity or scenes, correct?

19 A. Yes. Both Director Goto and Chief Howe admitted to
20 the -- to Hanauma Bay warranting that additional concern
21 and emphasis on lifeguard coverage because of that unique
22 phenomenon of snorkelers that are made inconspicuous by
23 that passive head in the water, motionless type of
24 conduct. It takes more eyes to detect those individuals.

25 I'm not sure that that is the case that we are

PAGE 48

48

1 know and we in aquatics know make, you know, make for
2 peril or that snorkelers are susceptible to.

3 I spoke at length about the inhalation, the
4 inadvertent inhalation syndrome, and in choppy water that
5 is very, very likely. That certainly is one of those
6 given that -- you know, that is certainly very likely in
7 light of the fact that they were competent swimmers and
8 snorkelers, but there was no eyewitness. Both
9 eyewitnesses to each other succumbed.

10 Q. Right. So basically what I'm hearing you testify
11 to, Mr. Ebro, is that we don't know what happened to
12 Mr. Powell, but based upon your experience, the likely
13 cause in your mind or the likely thing that happened to
14 Mr. Powell in your mind is that he inadvertently inhaled
15 some water; is that correct?

16 A. Correct.

17 Q. Okay. And you said that that was likely because of
18 the choppiness of the waves, correct?

19 A. That's correct. In choppy water, that is much more
20 likely than in smooth water, and the area they were
21 traveling in towards Witches Brew would have presented
22 them with challenging choppy conditions. It was a rough
23 day that day and so that the inadvertent inhalation is a
24 very common occurrence even amongst practiced and skillful
25 snorkelers.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

THE ESTATE OF ERIC A.) Civil No. CV04 00428 LEK
POWELL, THROUGH PERSONAL)
REPRESENTATIVE MARY K.) DECLARATION OF RALPH GOTO
POWELL; THE ESTATE OF JAMES)
D. LAUGHLIN, THROUGH)
PERSONAL REPRESENTATIVE)
REGINAE C. LAUGHLIN; MARY K.)
POWELL, INDIVIDUALLY;)
REGINAE C. LAUGHLIN,)
INDIVIDUALLY; CHLOE)
LAUGHLIN, A MINOR, THROUGH)
HER NEXT FRIEND, REGINAE C.)
LAUGHLIN,)
)
Plaintiffs,)
)
vs.)
)
CITY AND COUNTY OF)
HONOLULU,)
)
Defendant.)
)
and)
)
CITY AND COUNTY OF)
HONOLULU,)
)
Third-Party Plaintiff,)
)
vs)
)
UNIVERSITY OF HAWAII, a body)
corporate; JOHN DOES 1-10, JANE)
DOES 1-10, DOE)

CORPORATIONS and DOE)
ENTITIES,)
)
Third-Party Defendants.)
_____)

DECLARATION OF RALPH S. GOTO

I, RALPH S. GOTO, hereby declare as follows:

1. I am the Administrator of the Ocean Safety and Lifeguard Services Division, Honolulu Emergency Services Department, City & County of Honolulu, and have served in this capacity since 1981.
2. As the Division Administrator, I am responsible for the oversight of the City & County of Honolulu's ocean lifeguard service, which employs over 200 professional open water lifeguards and responds to aquatic emergencies that occur along the 198 miles of Oahu shoreline.
3. I have personal knowledge of and am competent to testify to the following:
4. Hanauma Bay Nature Preserve ("Hanauma Bay") is a beach park and Witches Brew is an area of water adjacent to Hanauma Bay beach park.
5. On July 19, 2002 ("Incident Date"), three warning signs that specified strong current were posted at Hanauma Bay pursuant to Act 190.

6. On Incident Date, the design of these warning signs along with their placement was approved by the chairperson of the board of land and natural resources pursuant to Act 190.

7. On the Incident Date, the Act 190 signs at Hanauma Bay were not vandalized, removed or illegible.

8. Attached as Exhibit E are true and correct color copies of the three Act 190 strong current warning signs as they existed on July 9, 2002.


9. I have reviewed the reports by the Ocean Safety and Lifeguard Services Division, Honolulu Emergency Services Department, City & County of Honolulu regarding the deaths of Erik Powell and James Laughlin.

10. From these documents, I am able to represent that the first swimmer that City lifeguards responded to was James Laughlin and the second swimmer that the lifeguards responded to was Erik Powell.

11. From these documents, I am able to represent that after the decedents swam pass the coral reef, no one witnessed what happened to the decedents until WSO Clarence Moses noticed Decedent Laughlin swimming near Witches Brew Point.

I, RALPH S. GOTO, declare under penalty of law that the foregoing is true and correct.

Dated: Honolulu, Hawaii, December 29, 2006.



Ralph S. Goto